

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Deployment of Wireline Services	)	CC Docket No. 98-147
Offering Advanced Telecommunications	)	
Capability	)	
	)	
Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions of the	)	
Telecommunications Act of 1996	)	
	)	
Applications for Consent to the	)	CC Docket No. 98-141
Transfer of Control of Licenses and	)	
Section 214 Authorizations from	)	
Ameritech Corporation, Transferor to	)	
SBC Communications Inc., Transferee	)	
	)	
Common Carrier Bureau and Office of	)	NSD-L-00-48
Engineering and Technology Announce	)	DA 00-981
Public Forum on Competitive Access to	)	
Next-Generation Remote Terminals	)	

**COMMENTS OF TIME WARNER TELECOM**

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**COMMENTS OF TIME WARNER TELECOM**

Time Warner Telecom ("TWTC")<sup>1</sup>, by its attorneys, hereby submits these comments in response to the Public Notice seeking comment on the Petition for Declaratory Ruling filed by the Association for Local Telecommunications Services ("ALTS") in the above-captioned proceedings ("ALTS Petition").

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<sup>1</sup> Time Warner Telecom is a leading optical network, facilities-based provider of integrated telecommunications solutions for businesses. The company currently serves business customers with last-mile broadband connections for data, Internet, and voice in 21 U.S. markets.

## **I. Introduction And Summary**

The ALTS Petition offers a helpful template for improving the quality of unbundled loop and special access provisioning. But the Commission must adopt two other measures, not discussed in the ALTS Petition, in order to ensure that CLECs are able to purchase end user connections from ILECs on terms and conditions that can support competition. First, the Commission should use its authority under Section 202(a) to require that performance measurements, benchmarks, reporting requirements and penalties that apply to loops also apply to interstate special access circuits. In so doing, the Commission should require ILECs to report separately on their performance for carrier customers and non-carrier customers, to diminish the likelihood that ILECs will discriminate against their competitor- customers.

Second, the Commission should require ILECs to provide to purchasing carriers information regarding the technology used in the provision of a special access circuit. Without this information, the service CLECs provide to their own customers can become degraded through no fault of the CLEC.

## **II. The Commission Should Establish National Performance Rules For Interstate Special Access Service Provided To Carriers.**

TWTC in general supports the goal of the ALTS Petition, which is to seek more specific and therefore more effective national rules regarding the ILEC provision of end user connections (whether unbundled loops or special access circuits)

to CLECs. These comments focus specifically on special access,<sup>2</sup> since TWTC uses high capacity special access circuits (generally DS1 or DS3 circuits) to establish end user connections wherever it is inefficient for TWTC to construct such connections itself.

The ALTS Petition acknowledges the importance of special access connections and asks the FCC to use its authority under Section 251 to establish a rule requiring ILECs to provision special access circuits within the same interval in which they provision these circuits for their own retail services. See ALTS Petition at 19. Such relief would be helpful, but it does not go far enough. Rather, the Commission should rely on its authority under Section 202(a) (which imposes a non-discrimination requirement on ILEC interstate special access service) to require that ILEC provision of special access be subject to comprehensive performance measures, benchmarks, reporting and penalty requirements that currently apply to equivalent loop facilities.

**A. The Commission Should Require ILECs to Comply with the Same Performance Measurements, Standards, Reporting Requirements and Penalties for Special Access Circuits as Apply to Unbundled Loops.**

For most of its customers, TWTC constructs its own end user connection "loop" facilities. Like many facilities-based CLECs, however, TWTC sometimes needs to purchase connections to end users from ILECs. But unlike CLECs that rely predominantly on ILECs for end user connections and that can justify the time and

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<sup>2</sup> The term special access, as used in these comments, is intended to mean interstate access only.

money necessary to upgrade their OSS to support pre-ordering and ordering of unbundled loops, TWTC does not purchase ILEC end user connections often enough to justify this expense. Thus, while individual special access circuits are often priced higher than unbundled loops, when all of the relevant costs are considered, special access is a more economical means of purchasing high-capacity end user connections for TWTC than unbundled elements.

In relying on special access circuits, TWTC encounters the same provisioning problems as CLECs that purchase these facilities as unbundled loops. For example, TWTC has repeatedly encountered the nightmare scenario that ILEC technicians do not show up at the customer premises to install circuits at the scheduled time, and ILECs often do not notify the customer or TWTC that they will not be able to meet appointments. Of course, this ILEC failure results in CLEC service problems from the customers' perspective because of factors beyond the control of the CLEC. TWTC has encountered similar problems in the maintenance context, in which ILECs often claim (implausibly) that they do not have available technicians to repair problems during regular business hours.

But preventing these problems is in some ways more difficult with special access than with loops because there are no established performance measures, standards, or self-enforcing penalties applicable to special access. Although TWTC has established its own internal performance measures and performance standards, these are often different from the ones the ILECs are willing to support. It is therefore all but impossible for TWTC

to track comprehensively the quality of special access circuits that it receives. Even if it could track the quality, the absence of applicable performance standards or penalties for ILECs' failure to provide acceptable service makes it all but impossible to assure a reasonable level of quality. As a result, TWTC is forced to negotiate independently with each individual ILEC outside of the Section 251-252 interconnection agreement framework (since interstate special access circuits are subject to Sections 201 and 202, not Sections 251 and 252, and are purchased out of interstate tariffs rather than interconnection agreements) to extract whatever minimal performance measures and assurances it can obtain.

This situation should be remedied. A CLEC should be able to rely on special access circuits to establish end user connections instead of unbundled loops when it is more efficient for the particular CLEC to do so. The Commission has established a clear policy in favor of adopting performance standards as a means of enforcing ILEC obligations to provide wholesale inputs to competitive carriers.<sup>3</sup> Further, all of the justifications for requiring ILECs to provide unbundled loops in accordance with strict, national provisioning standards apply equally to special

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<sup>3</sup> See Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region InterLATA Service in the State of New York, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶ 53 (1999) ("Performance measurements are an especially effective means of providing us with evidence of the quality and timeliness of the access provided by a BOC to requesting carriers.").

access. Special access circuits are an essential input of production for CLECs. The quality of this input has a significant impact on the quality of the full service CLECs provide to their customers. ILECs have no incentive to provide high quality special access service to CLECs. Moreover, the high costs associated with dispute resolution in this area justify uniform, national rules with self-executing penalties.

There is also ample precedent for federal performance requirements applicable to special access, including the high capacity special access used by TWTC. Such reporting requirements have been required for high capacity unbundled loops by the Commission as part of the conditions for approval of ILEC mergers.<sup>4</sup> The Commission also requires ILECs to provide data in its ARMIS reports on service quality for special access provided to long distance carriers. See 47 C.F.R. § 43.21(g); ARMIS 43-05

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<sup>4</sup> See Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, CC Docket No. 98-184, Memorandum Opinion and Order, Appendix D, Attachment A (imposing performance requirements and self-executing penalties on "special services," which include DS1 and DS3 services, but which apparently exclude such facilities when purchased out of access tariffs (see Attachment A-2a-41) (rel. June 16, 2000) ("Bell Atlantic-GTE Order"); Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, Memorandum Opinion and Order, 13 FCC Rcd 18025, Appendix C, Attachments A-2a through A-6 (1999) (describing performance requirements for SBC/Ameritech that include requirements applicable to high capacity DS1 loops) ("SBC-Ameritech Order").



Service Quality Report, Table 1. In addition, the Commission imposed more extensive and more frequent requirements for service quality reports on special access provided to long distance carriers as part of the ILEC merger conditions. See SBC-Ameritech Order, ¶ 404; Bell Atlantic-GTE Order, ¶ 72. These more extensive requirements were imposed in part because of the Commission's concern that, after the merging BOCs entered the in-region interLATA market, their incentive and ability to discriminate against their competitors in the long distance market would be increased as a result of the merger. See SBC-Ameritech Order, ¶ 225-30; Bell Atlantic-GTE Order, ¶ 191-95.

The Commission should therefore establish a set of performance requirements (including performance measurements, standards, reporting requirements)<sup>5</sup> with automatic self-executing penalties applicable to special access circuits provided to any carrier (CLEC or IXC).<sup>6</sup> There are several models that could be

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<sup>5</sup> "Performance measurements" provide a methodology to collect data regarding the ILEC's performance, for example, the period of time it takes to provision an unbundled loop. "Performance standards" require specific performance goals or benchmarks, such as a requirement that a loop be provisioned in a specified period of time. See Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, Notice of Proposed Rulemaking, 13 FCC Rcd 12817, ¶ 18 (1998).

<sup>6</sup> Ideally, such requirements would apply to CLECs, but it is impractical to try to distinguish between CLECs and long distance carriers. Moreover, since many ILECs already provide long distance service and the BOCs will do so over the course of the next few years as well, the same competitive concerns that justify the need for requirements applicable to CLECs generally apply to long distance carriers.

easily applied to special access circuits in this regard. In each case, the existing requirements applicable to unbundled loops could be applied to the equivalent facility when purchased as special access. For example, requirements applicable to DS1 and DS3 loops would apply to special access loops of DS1 and DS3 capacity. TWTC suggests that, in the SBC and Bell Atlantic-GTE territories, the Commission apply to special access the requirements applicable to loops under the merger conditions. In all other service areas, the Commission should require that the ILEC (the requirement should probably be limited to Tier I ILECs) apply the state loop performance requirements applicable to interstate special access.

These requirements should be readily applicable to special access. Nevertheless, out of an abundance of caution, TWTC asks only that the FCC establish a presumption that the loop requirements just discussed apply to special access. This will allow for the unlikely possibility that it is technically infeasible in certain cases for the ILEC to meet the loop requirements when provisioning special access circuits. Given the Commission's exclusive jurisdiction over interstate special access circuits, the Commission should itself decide whether an ILEC has adequately demonstrated infeasibility in a certain case.

Finally, there should be little doubt that the Commission has the authority to impose these kinds of requirements on the ILEC provision of special access. Most obviously, the Commission could rely on its authority under Section 202(a). That provision prohibits "unjust or unreasonable discrimination in charges,

practices, classifications, regulations, facilities, or services for or in connection with like communications service...."<sup>7</sup> In applying this provision, the Commission examines whether two services are "like," whether there is disparate treatment by the carrier providing the service, and whether such disparate treatment is unreasonable. See MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990).

The Commission could easily conclude that significant differences in provisioning the same facilities depending on whether they are ordered as unbundled loops or special access circuits meets this standard. First, in order to determine whether services are "like" each other, the Commission "focuses on whether the services in question are 'different in any material functional respect.'" Ad Hoc Telecommunications Users Comm. v. FCC, 680 F.2d 790, 795 (D.C. Cir. 1982) (quoting American Trucking Ass'n v. FCC, 377 F.2d 121, 127 (1966), cert. denied, 386 U.S. 943.). To determine if services are functionally equivalent, the Commission looks at the nature of the services and whether customers perceive them as performing the same functions. American Broadcasting Co. v. FCC, 663 F.2d 133, 139 (D.C. Cir. 1980). "If 'customers regard[] the ...

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<sup>7</sup> 47 U.S.C. § 202(a); see also Competitive Telecommunications Ass'n v. FCC, 998 F.2d 1058, 1062 (D.C. Cir. 1993) ("The Congress's intention comprehensively to outlaw discrimination is apparent from the terms of the statute, which prohibits unreasonable discrimination not only in 'charges' but also in 'practices, classifications, regulations, facilities, or services ... directly or indirectly, by any means or device.'" (quoting 47 U.S.C. § 202(a)).

service as the same, with cost considerations being the sole determining criterion,' the services are like." MCI v. FCC, 917 F.2d at 39 (quoting American Broadcasting Co. v. FCC, 663 F.2d at 139.).

Except where important countervailing policy considerations have resulted in limitations on the availability of unbundled loops in certain circumstances,<sup>8</sup> special access circuits and unbundled loops provide service that is the same in every material functional respect. In fact, the FCC has held that high-capacity end user connections are included in the definition of unbundled loops.<sup>9</sup> In so doing, the FCC specifically found that "the facilities that underlie private line and special access interconnection" should be included in the definition of unbundled loops. UNE Remand Order, ¶ 177. Moreover, as explained, TWTC chooses to purchase special access rather than loops based solely on a comparison of the total cost of the two alternatives. This is further conclusive proof that loops and special access are "like" services.

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<sup>8</sup> See Implementation of the Local Competition Provisions Of The Telecommunications Act of 1996, CC Docket No. 96-98, Supplemental Order Clarification, ¶¶ 21-22 (rel. June 2, 2000) (defining circumstances in which ILECs are not required to provide loop-transport combinations; special access circuits are available in these contexts).

<sup>9</sup> See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order, ¶ 176 (rel. Nov. 5, 1999) (UNE Remand Order).

Moreover, while TWTC does not have adequate data at this time to determine the extent to which ILECs provide high capacity loops on terms that are different from or superior to those for high capacity special access, it is clear that any such differential treatment would be unreasonable. Firms should be able to choose between purchasing identical physical circuits out of either an interstate tariff (for special access) or out of an interconnection agreement (for unbundled loops). Although the specific OSS functionalities used for the ordering, provisioning, maintenance and repair of these circuits are sometimes different, the quality of the wholesale service provided by ILECs to their CLEC customers should be the same. It is therefore well within the Commission's authority to establish a national regulatory regime for preventing disparate treatment of end user connections provided as loops and special access.<sup>10</sup>

**B. The Commission Should Also Adopt Performance Standards to Ensure that ILECs are Provisioning Special Access to Their Competitors at Parity with Their Non-Competitor Customers.**

Unbundled loops are purchased from ILECs solely by the ILECs' competitors. In contrast, special access circuits are purchased from ILECs by both the ILECs' competitor-customers and

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<sup>10</sup> Moreover, there can be no question that the Commission can use section 202(a) to prevent unreasonable discrimination between traditionally intrastate services (local loops) and interstate services (interstate special access). See New York Tel. Co. v. FCC, 631 F.2d 1059 (2d Cir. 1980). Here, the case is even stronger because the Commission has jurisdiction over unbundled loop provisioning. See AT&T Corp. v. Iowa Util. Bd., 119 S. Ct. 721 (1999).

their non-competitor customers. ILECs therefore have the incentive to discriminate among purchasers of special access circuits whereas this incentive is not a significant factor in the loop provisioning context. Thus, in addition to mandating that loop requirements apply to interstate special access, the Commission should also ensure that ILECs cannot selectively discriminate against competitor-customers in the provision of special access. Again, the Commission has ample authority to require this result under section 202(a).

In order to detect and deter ILEC discrimination in provisioning of special access in violation of section 202(a), the Commission should adopt performance standards to ensure that provisioning of special access to competitors is at parity with provisioning to non-competitor customers. To achieve this, the Commission should require ILECs to report performance measurements separately for their carrier and non-carrier customers.<sup>11</sup> This should not be overly difficult, since, as mentioned, the Commission already requires ILECs to report on the special access services provided to long distance carriers (as opposed to those provided to all other purchasers of special access). Special penalties should also apply where an ILEC provides service to non-carrier customers that is superior to the service it provides its carrier customers.

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<sup>11</sup> Again, while the competitive concern is greatest with CLECs, there is no easy way to distinguish between CLEC and long distance carrier purchasers of special access, and long distance carriers are increasingly in a competitive position with ILECs in any event.

**III. The Commission Should Require ILECs To Disclose Information Regarding Special Access Circuits To CLEC Special Access Customers.**

CLECs that lease special access circuits from ILECs also need nondiscriminatory access to information about the type of technology deployed on that circuit by the provisioning ILEC. Without this information, CLEC customers may experience service degradation. For instance, it is critically important for TWTC to know if an ILEC-provisioned special access circuit is provided using HDSL technology. TWTC needs this information so that it can request that the ILEC turn off the "framing" on the circuits or make other adjustments necessary for TWTC to provide service over the circuit to its end user customer. Absent this ability, TWTC's customers experience high bit error rates on the circuit (resulting in lost dial tone or dropped calls).

Moreover, there is precedent for requiring ILECs to provide CLECs with information as to the physical characteristics of the a particular special access circuit. This information is closely analogous to the pre-qualification information the Commission has already required ILECs to provide to xDSL providers.<sup>12</sup> It is hard to see how access to information about the characteristics of loop facilities should be mandated for CLECs that rely on unbundled loops and not for CLECs that rely on special access

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<sup>12</sup> 47 C.F.R. § 51.231; See Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912, ¶ 204 (1999).

loops. In either case, when the CLEC is denied access to the information, the service it provides to its customers suffers due to factors completely outside of its control. As the Commission has concluded, "disclosure [of loop information] will allow for a more open and accessible environment, foster competition, and encourage deployment ...."<sup>13</sup> There is every reason to conclude that this statement applies just as much to special access-based competition as to unbundled loop-based competition.

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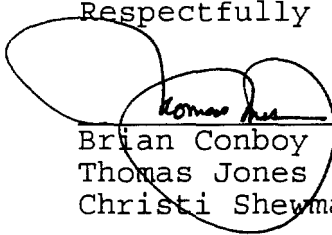
<sup>13</sup> Deployment of Wireline Services Offering Advanced Telecommunications Capability, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761, ¶73 (1999).



#### IV. Conclusion

The Commission should establish special access provisioning rules in accordance with the recommendations made herein.

Respectfully submitted,



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